

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK MALASKI,

Defendant-Appellant.

UNPUBLISHED

June 30, 2005

No. 252635

Macomb Circuit Court

LC No. 03-000641-FH

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant pleaded guilty of felonious assault, MCL 750.82, and possession of firearm during the commission of a felony, MCL 750.227b. He was sentenced to one to four years’ imprisonment for the assault conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals by delayed leave granted. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

As a factual basis for his plea, defendant admitted pointing a rifle at his neighbor to scare him. The prosecutor recommended that defendant serve his sentence in Caro Hospital and that if defendant is released from the hospital before serving his full sentence, he then be placed with the Department of Corrections. Defense counsel agreed. Counsel stated that defendant was on medication but that the effectiveness of the medication varied greatly. The trial court accepted defendant’s plea.

The trial court sentenced defendant to one to four years imprisonment for the assault conviction and two years imprisonment for the felony-firearm conviction. The trial court specified that defendant was to serve his sentences at Caro Hospital, and, once discharged, was to serve the remainder of his sentences at the Department of Corrections. However, at a resentencing hearing, the trial court stated that the Department of Corrections had indicated that defendant’s sentence could not be carried out as ordered; specifically, the placement of defendant at Caro Hospital. The court recognized that it did not have authority regarding a specific placement for defendant within the Department of Corrections, but recommended that defendant undergo a mental health examination as soon as possible and be placed in an appropriate setting.

Defendant filed a motion to withdraw his guilty plea, contending that it was not an understanding and voluntary plea because he was on medication at the time it was tendered. The trial court determined that, looking at defendant's plea as a whole, defendant was competent to enter the plea despite the fact he was on medication at the time he tendered the plea. Therefore, the court denied the motion.

II. STANDARD OF REVIEW

Defendant argues that his guilty plea was not knowing and voluntary because his medication rendered him incompetent to tender the plea. This Court reviews for an abuse of discretion a trial court's decision on a motion to withdraw a guilty plea. *People v Patmore*, 264 Mich App 139, 148-149; 693 NW2d 385 (2004); *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000). An abuse of discretion occurs when an unprejudiced person, considering the facts upon which the trial court relied, would conclude that there exists no justification or excuse for the ruling. *Patmore, supra* at 149; *People v Clement*, 254 Mich App 387, 389; 657 NW2d 172 (2002).

III. ANALYSIS

A. KNOWING & VOLUNTARY GUILTY PLEA

A defendant does not have an absolute right to withdraw a guilty plea once the plea is tendered and the trial court accepts the plea. *Patmore, supra* at 149; *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). MCR 6.302 provides that a trial court may not accept a plea "unless it is convinced that the plea is understanding, voluntary, and accurate." Defendant argues that his plea was not knowing and voluntary because he was on prescription medication when it was made. A review of the plea proceeding as a whole, however, reveals that defendant's plea was knowing and voluntary and that he was competent to tender the plea. The trial court followed the requirements articulated in MCR 6.302(B), (C), and (D) before accepting the plea. The court questioned defendant as follows:

Q. And does the taking of these medications impair your ability to understand me or does it assist you in understanding me or doesn't it matter one way or the other?

A. I'm not sure.

Q. Okay. Do you understand what is going on here today?

A. Yes.

Q. Have you heard me and your counsel and the prosecutor?

A. Yes, sir.

Q. Do you understand each of us?

A. Yes.

Q. If I were to ask you is there a plea bargain or plea agreement in this matter, is there?

A. Yes.

Q. Do you understand that under the terms of the plea bargain – has the entire plea bargain been stated on the record by the prosecuting attorney and your attorney?

A. I don't know.

Q. Well, did you hear them? Did you hear --

A. Yes, I guess so.

In addition, defendant responded affirmatively to the court's question inquiring whether he understood that by pleading guilty he was giving up his right to a jury trial, his right to call witnesses on his behalf, and his right to testify at trial. Further, defense counsel admitted that defendant was competent to tender the plea at that time. In light of this record, the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea on the basis that his medication rendered him incompetent to enter a knowing and voluntary plea.

B. RESENTENCING

Defendant also contends that his plea was induced by a promise that he would serve at least a portion of his sentence at Caro Hospital. Defendant's failure to move to withdraw his plea on this basis in the trial court and his acquiescence to the court's resentencing constituted waiver of this issue. Waiver is "the 'intentional relinquishment or abandonment of a known right.'" *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). A party who waives his rights may not thereafter seek appellate review regarding the deprivation of those rights because the waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). See also MCR 6.311(C).

The purpose of resentencing defendant was to correct the trial court's previous sentence requiring defendant's placement at Caro Hospital. At the hearing, defense counsel acquiesced to the sentence, stating:

Your Honor, I think the Court's well aware of the discussions we've had off record and in chambers and we are here for resentencing. I think the commentary on the disposition speaks for itself. I think the appropriate authorities have been notified of [defendant's] condition and will do the best to place him appropriately. I would – the only difference that I would ask the Court to note is that apparently if the sentence is going to be re-imposed technically, he's entitled to another 23 days jail credit.

Thereafter, the trial court imposed the same sentences, but without the requirement that defendant be placed in Caro Hospital. Because defendant was aware of the sentences being

imposed and acquiesced to the removal of the condition that he be placed at Caro Hospital rather than the Department of Corrections, he waived any argument that he should be permitted to withdraw his plea on this basis. Thus, by expressly approving of the resentencing, defendant waived this issue on appeal. *Carter, supra* at 215; *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Affirmed.

/s/ Peter D. O'Connell

/s/ Bill Schuette

/s/ Stephen L. Borrello